



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JUNE 20, 2023

IN THE MATTER OF:

Appeal Board No. 628540

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective May 6, 2021, on the basis that the claimant voluntarily separated from employment without good cause. The claimant requested a hearing.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the Commissioner of Labor. By decision filed March 17, 2023 (), the Administrative Law Judge overruled the initial determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer as a security guard supervisor and lead Fire & Life Safety Director (FLSD) for approximately six years, until May 5, 2021. The claimant was aware that he was required to maintain a security guard license in order to work as a security guard; to work as a Fire & Life Safety Director, he was also required to maintain a separate license that was issued by the New York City Fire Department.

On March 7, 2021, the claimant was shot by his roommate and briefly hospitalized. His security guard license was due to expire on April 5, 2021.

Although the claimant took steps to renew his security guard license, he was unable to complete all the required elements of the renewal process before his license expired. The employer was aware that the license expired on April 5 but allowed the claimant to continue to work. The claimant last worked for the employer on May 5, 2021.

On May 6, 2021, the claimant was arrested and charged with felony criminal possession of a firearm. The gun was found in his bedroom during the police investigation of the shooting incident. The claimant subsequently was unable to renew his security guard license because of the pending charges against him and the employer advised him that he could not return to work until the license was restored. The claimant's FLSD license was not affected by his arrest and remained in effect.

On May 27, 2022, the claimant pled guilty to a misdemeanor charge of illegal possession of a firearm. At the time that he entered his plea, he stated under oath that the firearm in question was his. The claimant accepted the plea deal in order to avoid jailtime and to receive a conditional discharge after one year so that he could then renew his security guard license. The claimant's license was restored on December 18, 2022.

OPINION: The credible evidence establishes that the claimant's employment ended after his security guard license, a requirement of his employment as a security guard supervisor, expired on April 5, 2021. We have considered the Commissioner of Labor's argument that these circumstances constitute a voluntary leaving of employment without good cause pursuant to the doctrine of provoked discharge.

In Matter of DeGrego, 39 NY2d 180, the Court held that a claimant may be deemed to have quit his or her job under this doctrine if three elements are satisfied: the claimant must have voluntarily engaged in conduct which transgressed a known obligation and left the employer no choice but to fire the claimant. We will now apply this test to the matter before us to determine if the circumstances in this particular matter fall within its scope.

We find that they do not. It is significant that the claimant's security guard license expired a full month before he was arrested and charged with felony possession of a firearm. Although these charges later prevented him from renewing the already expired license, and he ultimately pled guilty to a reduced charge, there is no nexus between the claimant's criminal conduct and

the loss of the license. As a result, the first two elements required for provoked discharge are unsatisfied. We find that the third prong of the test is not satisfied as well. It is significant that despite being aware that the license had expired, the employer allowed the claimant to continue in his employment for another month (see Appeal Board No. 567368, where no provoked discharge was found because the employer allowed the claimant, a security guard, to work an additional month despite knowing that the claimant's security guard license had expired). Nor has the employer appeared in this matter to establish that it had no choice but to fire the claimant due to the loss of the security guard license, especially since the claimant held a second position with the employer and continued to maintain the licensure he needed for that position (see Appeal Board No. 552039, where the employer did not appear to provide testimony and evidence establishing why it could not continue to offer the claimant, an armed security guard who lost his firearms license, work as an unarmed guard although this was the position he originally held at the time of hire).

As the elements of the provoked discharge analysis have not been met, we must conclude that the claimant's separation from employment did not occur under disqualifying conditions. Accordingly, he is allowed benefits.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER